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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD MARK BLANCHARD, Defendant and Appellant.	E038575 (Super.Ct.No. RIC 105523) OPINION

APPEAL from the Superior Court of Riverside County. Vilia G. Sherman, Judge. Affirmed.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Supervising Attorney General, Pamela Ratner Sobeck,

Supervising Deputy Attorney General, and David Delgado-Rucci, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of three counts and acquitted defendant of two counts of lewd and lascivious acts with a minor under 14 years of age. (Pen. Code, §288, subd. (a).[1]) Count 1 involved an alleged offense in March 2001. Counts 2 through 5 involved alleged offenses in December 2001. The court sentenced defendant to the midterm of six years on count 1 and concurrent midterm sentences on counts 2 and 3.

At trial, the defendant relied on two somewhat inconsistent theories: first, that the victim, Jane Doe, had imagined being molested as part of a sleep disorder; and, second, that Jane Doe's mother, Carla C., encouraged her daughter to make molestation allegations as revenge for defendant breaking up with her.

On appeal, defendant raises multiple claims of error, including prosecutorial misconduct; deprivation of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel and confrontation; violations of due process; error concerning expert testimony; judicial misconduct; insufficiency of evidence; and sentencing error. We reject defendant's claims and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was born in 1959 and had no prior criminal history. He has a bachelor's degree in Geology and an MBA from the University of Pennsylvania's

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[footnote continued on next page]

Wharton School and a master of arts. He was a CIA case officer between 1984 and 1989. He was married for 10 years and has one son. He was divorced in 1996. In 1999, he obtained a real estate license.

Defendant met Carla C. through an online personals advertisement in September 1999. Defendant often spent the night at Carla's house where she lived with her two daughters, Jane Doe,[2] and a younger girl.[3] The relationship between defendant and Carla C. continued intermittently until January 8, 2002, when Carla confronted defendant about molesting Jane Doe.

Carla testified that, on December 20, 2001, Jane Doe told Carla she did not want defendant to stay with her while Carla visited her older daughter. Previously Jane Doe had enjoyed spending time with defendant. At first, Jane Doe resisted explaining, saying her mother would think she was dreaming. Then she made a vague comment that defendant had touched her "down there." Upon being pressed, Jane Doe explained further that defendant had come into her room more than once and "touched my bottom." She insisted it was not a dream and that, after it happened and defendant had left, she came out of the bedroom to get a drink of water and to let him know she was awake so he would stop the behavior.

[footnote continued from previous page]

2 Jane Doe was born in February 1994. She was seven years old in 2001 and 10 years old when she testified in early 2005.

3 A third, older daughter lived in North Carolina.

Jane Doe said the touching had occurred the night before when defendant had stayed with the children while Carla picked up her mother at the airport. Carla had returned home and found defendant asleep on the couch. Jane Doe was asleep in Carla's bedroom.

Carla did not immediately report what her daughter had told her. For the rest of December, Carla continued to allow defendant to visit her house. On New Year's Eve, Carla, her daughters, defendant, and his son, all traveled together to Las Vegas and spent one night in a hotel.

Toward the end of December, Carla talked to Jane Doe about a urinary tract infection, prompted by the child sitting on her foot, using the bathroom often, and complaining "her bottom was itchy."

Eventually, Carla called Child Protective Services to inquire about the reporting process. She finally called the police in January 2002. Carla then drove to defendant's apartment and announced Jane Doe had accused him of touching her, that "it's a really big deal," and that she was reporting the information to the police and taking Jane Doe for a medical examination.

Defendant responded, "Well, what do they want me to do? Who do they want me to talk to? What are we supposed to do now or next?" Defendant was pale and nervous. Carla left because the children were waiting in the car.

Jane Doe had some previous episodes of sleepwalking in which she was asleep and her mother could not convince her she was dreaming and not awake. Once Jane Doe went into the kitchen and rattled pots and pans.

On cross-examination, Carla denied ever having told defendant they could work things out or "make this go away." But she acknowledged continuing a sexual relationship with him after reporting to the police. During the trial, Carla was taking Dexedrine for attention deficit disorder and Paxil. She was also taking Dexedrine in 2001.

Jane Doe was interviewed by the Riverside Child Assessment Team (RCAT) on January 17, 2002. The jury viewed the videotape of the RCAT interview in which Jane Doe told the interviewer defendant had used his hand to rub her "front bottom" and "back bottom" on two occasions, once in March 2001 and again in December 2001, causing her "front bottom" to feel "kind of wet." Jane Doe explained that on the second occasion, "[his hand] went inside. There's two things it moved around and it went inside" the "front bottom." Also, defendant went in and out of the room more than once and he kissed her on her lower back and her stomach.

At trial three years later, Jane Doe described defendant as being her mother's boyfriend who sometimes spent the night at their house. Mark touched her in her bedroom on two occasions, occurring months or years apart. Both times, he touched her "private part," which she explained meant the urinary opening, under her clothes. The first time he touched her she was about six years old. It was night and she was in her bedroom, wearing pajamas. He pulled off the covers and touched her "private part" with his hand. Afterwards, she fell asleep and was afraid to tell anyone. The second time she was awakened in her bedroom by a noise and saw defendant's face in the doorway. He

touched her “private part” and she fell asleep again. She also testified the second time he touched her, she woke up and said she needed a drink of water.

Detective Paul Bonaime testified that he interviewed Carla and had her make a “pretext call” to defendant in which she used a script to talk to him. Defendant did not make any admissions during the call. The detective described defendant’s response to Carla confronting him as a “passive denial.” Bonaime also stated that Carla told him Jane Doe had problems with sleepwalking.

Defendant testified about his educational background, his five years in the CIA, and his stint as a Mormon missionary. He also worked in the import/export business and as a private investigator involving counterfeiting. Most currently he worked in real estate selling new homes. He had no criminal history. He was divorced with a son who was age 10 at the time of trial.

After defendant met Carla in 1999, their relationship progressed quickly. He began spending several nights a week at her house. The first night he spent there he was awakened by loud banging in the kitchen caused by Jane Doe sleepwalking. The sleepwalking episodes occurred frequently and involved Jane Doe using the washer and dryer, watering the lawn, and feeding the dog in the middle of the night.

Defendant supervised the children and helped with their homework. Defendant’s son also spent the night at Carla’s house.

Defendant broke up with Carla in December 1999 and then reconciled with her about seven months later. His relationship with Carla continued to be intermittent. They were not together in March 2001 and defendant denies touching Jane Doe at that time.

By summer 2001, they were reunited and had established a shared schedule for baby-sitting the children. They had less frequent contact in fall 2001 and broke up again in November 2001. Defendant accompanied Carla to an office Christmas party as a favor. Afterwards they engaged in sexual foreplay on the living room couch at her house. When defendant used the bathroom, he found Jane Doe asleep on the hallway floor. He called Carla over and picked the child up and returned her to bed.

On December 19, Carla asked defendant to come stay with her children because her mother's plane was arriving so late. He came over about 10:30 p.m. Carla left for the airport at 1:30 a.m. Defendant fell asleep on the couch and awoke when he heard Jane Doe say she was hot and wanted some water. He told her to sleep in her mother's room where it was cooler. He fell asleep again until Carla and her mother returned about 3:00 or 3:30 a.m. He never touched Jane Doe. He told Carla about Jane Doe sleepwalking again.

Defendant slept the rest of the night on the couch and left early in the morning for work. In the next few days, he took his son to visit his grandparents in Utah, returning December 26. On December 27, the families had a belated Christmas party and exchanged gifts. Carla watched defendant's son on December 29 and 30. They all went to a drive-in movie one night. Carla told defendant she was delaying her trip because Jane Doe did not want her to go. During a scary scene at the movie, Jane Doe took refuge in defendant's lap.

On December 31, both families drove to Las Vegas so defendant's son could fly home from there. That night, all five people shared a motel room. The next morning,

after taking defendant's son to the airport, defendant, Carla, and her daughters went sightseeing and visited an aquarium.

The last contact defendant had with Carla was when she confronted him in January about molesting Jane Doe. Afterwards she persisted in trying to reach him but he refused to have any further contact.

Defendant presented a number of character witnesses, including his sister, a medical doctor. Additionally, defendant presented an expert witness on sleep disorder, Dr. Max Hirshkowitz, whose testimony will be discussed more fully below.

The jury convicted defendant of one offense occurring in March 2001 and two offenses occurring in December 2001. It acquitted defendant of two other alleged offenses occurring in December 2001.

II

ANALYSIS

A. Prosecutorial Misconduct

Defendant identifies three instances of purported prosecutorial misconduct. First, the prosecutor elicited a statement from Detective Bonamie that defendant had told Carla during the pretext call he had been advised by counsel not to speak to her. The court admonished the jury to disregard Bonamie's testimony and the court criticized the prosecutor's conduct but denied defendant's mistrial motion.

Later defense counsel elicited a statement from defendant that the police had not asked him to give a videotaped statement. The court permitted the prosecutor to ask defendant whether he had been offered an opportunity to speak to the police, to which he

responded affirmatively. Finally, the prosecutor used the foregoing to argue in closing that defendant had lied about whether he could have talked to the police.

Defendant argues the prosecutor improperly implied defendant had refused to talk to the police and then lied about it, causing prejudicial federal and state constitutional error: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (*Ibid.*) [¶] 'It is, of course, misconduct for a prosecutor to "intentionally elicit inadmissible testimony." [Citations.]' [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Hill* (1998) 17 Cal.4th 800, 819, 844.)

As to the prosecutor's questions involving the pretext call, the record indicates the testimony from Detective Bonamie was elicited inadvertently and surprised the prosecutor. The prosecutor's conduct was not intemperate, egregious, deceptive or reprehensible, so as to create constitutional error. In calling defendant a liar in closing argument, the prosecutor acted with the "wide latitude to discuss and draw inferences

from the evidence at trial" afforded to her by the law. (*People v. Lucas* (1995) 12 Cal.4th 415, 473; *People v. Welch* (1999) 20 Cal.4th 701, 753 (*Welch*).)

Additionally, we deem any error harmless beyond a reasonable doubt. Defendant himself voluntarily returned to the topic of whether he spoke to the police and therefore was subject to cross-examination and impeachment. (Evid. Code, § 773, subd. (a).) Ultimately, it was clear defendant did not talk to either Carla or the police although he could have. But the court cured any error by admonishing the jury not to draw any inference from that information. (*People v. Bustamonte* (1969) 270 Cal.App.2d 648, 656-657 (*Bustamonte*).)

Furthermore, we conclude the evidence against defendant was overwhelming as to the three convictions. Jane Doe consistently identified two occasions and a minimum of three separate episodes, implicating defendant. *(Bustamonte*, *supra*, 270 Cal.App.2d at p. 657.) The purported misconduct did not create prejudicial error. (*Welch*, *supra*, 20 Cal.4th at p. 753.)

For the same reasons, we reject defendant's argument the prosecutor's conduct deprived defendant of his Fifth Amendment right against self-incrimination. (*Jenkins v. Anderson* (1980) 447 U.S. 231, 235-236 [Fifth Amendment privilege not violated by impeachment of testifying defendant with his prearrest silence].)

We also find no abuse of discretion in the trial court denying defendant's motion for mistrial based on Detective Bonamie's testimony. (*People v. Silva* (2001) 25 Cal.4th 345, 372.)

B. Impeachment of Carla

Defendant contends the trial court abused its discretion and violated his Sixth Amendment right to confrontation when it limited his efforts to impeach Carla by showing she was motivated by revenge against defendant and that her use of Paxil and Dexedrine distorted her perceptions. The record simply does not support defendant's theory and, in fact, demonstrates the opposite.

Defendant was allowed to cross-examine Carla and question another witness about her continuing post-offense efforts to maintain contact with defendant. He was also allowed to question her about her drug use. Apparently, Carla's performance on the stand suggested she was somehow impaired. The court called Carla a "nightmare" witness, taking longer to answer questions than any witness the court had seen in 11 years. Later, the court commented Carla could not be regarded as "normal." Finally, defendant was allowed to testify in detail regarding the volatility of their relationship and Carla's erratic behavior.

Under these circumstances, there is no merit to defendant's claim he was not allowed to impeach Carla and was denied his Sixth Amendment rights.

C. Dr. Aldana's Testimony

After her RCAT interview, Jane Doe was examined by Dr. Daniel Aldana, a forensic pediatrician who said Jane Doe had a "normal examination" that did not confirm or exclude sexual abuse. According to the prosecution, Dr. Aldana did not interview Jane Doe during the examination. Subsequently, in July 2003, the district attorney filed criminal charges for monetary theft against Dr. Aldana. Neither the prosecution nor

defendant called Dr. Aldana as a witness at trial. Defense counsel expressed a concern that Dr. Aldana would invoke the Fifth Amendment if called as a witness.

Defendant protests that the prosecution should have called Dr. Aldana and should have disclosed any evidence about the doctor interviewing Jane Doe during the examination, as well as any investigation reports of Dr. Aldana's independent theft crimes.

Defendant's argument makes little sense because he could easily have subpoenaed Dr. Aldana to testify and asked him whether he had interviewed Jane Doe and whether he had any information other than his written report of the examination. Defendant could also have asked the doctor about the criminal prosecution for impeachment purposes. It was hardly incumbent upon the prosecutor to call a witness solely for the purpose of giving defendant easy access.

This is not a case, like those cited by defendant, in which the prosecutor had an obligation to disclose evidence favorable to defendant and material to defendant's guilt (*U.S. v. Bagley* (1985) 473 U.S. 667, 674, citing *Brady v. Maryland* (1963) 373 U.S. 83) or bearing on the issue of the credibility of a key prosecution witness. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1182.) Dr. Aldana was not a prosecution witness at all and there did not exist any favorable or material evidence to be disclosed by the prosecution to defendant.

Nor is this a case in which the prosecution prevented Dr. Aldana from testifying favorably for defendant, violating the Sixth Amendment and the Fourteenth Amendment: To establish a violation, the claimant bears the burden of showing three elements:

prosecutorial misconduct that made a defense witness unwilling to testify; a causal link between the prosecutorial misconduct and the defendant's inability to present the witness; and materiality. As to the latter, "'[u]nder California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable. [Citations.]'" (*In re Williams* (1994) 7 Cal.4th 572, 603.)

None of the required three elements are established here. By prosecuting Dr. Aldana in a separate criminal action, the district attorney's office did not engage in misconduct. There was also no showing, other than defense counsel's personal opinion, that Dr. Aldana was unwilling or refused to testify in the present case. Finally, as previously discussed, there was no showing it was reasonably possible Dr. Aldana would offer testimony that was either material or favorable for defendant's case.

D. Expert Testimony

Defendant planned to use two experts, Dr. Hirshkowitz about sleep disorders and Dr. Brenda Colvin, defendant's sister and a nonpracticing physician, about vaginal moistness and urinary tract infections in young girls, sleep disorders in children, and the effects of medication on Carla. The record reflects defendant did not comply with reciprocal discovery rules concerning his experts. (§ 1054.3, subd. (a); *People v. Tillis* (1998) 18 Cal.4th 284, 287, fn. 1.) The court limited some of Dr. Hirshkowitz's testimony and precluded Dr. Colvin from testifying except as a character witness for her brother.

Under Evidence Code section 801, expert testimony must relate to a subject sufficiently beyond common experience so that admission of the evidence assists the

jury. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506, citing *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) The appellate court reviews a trial court's decision to exclude expert testimony for a clear showing of manifest abuse of discretion. (*Valdez, supra,* at p. 506; *People v. Rowland* (1992) 4 Cal.4th 238, 266.)

Dr. Hirshkowitz was allowed to testify about states of confusion during sleep, partial arousals, sleep talking, and sleepwalking. Ultimately, he was not allowed to testify about SPHH, which he described as "sleep paralysis with hypnagogic hallucinations" and manifesting itself as a feeling of being paralyzed with an accompanying sense of a malevolent presence: "What happens is the person awakens, they're paralyzed, there's something, a monster, a being of some sort, usually sits on their chest, causes them not to be able to breathe, and there's also the feeling that their life force is being sucked out of them."

Even conceding that Jane Doe testified that she felt she could not move during the molestations, there was nothing more in the record to support expert testimony of this nature. Jane Doe did not refer to a malevolent presence or a creature crouched on her chest, inhibiting her breathing and sucking out her life force. The court did not abuse its discretion in striking the testimony of the expert and continuing to circumscribe his testimony on this point. Additionally, Dr. Hirshkowitz testified on cross-examination that he did not know of any studies concerning the sexual responses of seven-year-old girls during sleep.

The trial court also did not abuse its discretion by precluding the testimony of Dr. Colvin on various topics because it was patently obvious she was unqualified having

ceased medical practice in 2000. As to Carla's use of drugs, Dr. Colvin's only qualification was her general medical knowledge about drugs based on studying pharmacology and renewing prescriptions issued by medical specialists. Regarding sleep disorders, her experience was confined to a military setting and personal experience in her own family. In any case, Dr. Hirshkowitz testified as the expert on sleep disorders.

The issues of vaginal moistness and the possibility of Jane Doe suffering a urinary tract infection also did not require expert testimony. The latter issue never became material and relevant because no evidence ever showed Jane Doe was actually diagnosed with a urinary tract infection. As to the former, the court acted within its discretion when it determined that the reasons for vaginal moistness did not need to be the subject of expert testimony. (§ 801, subd. (a); *People v. Torres* (1995) 33 Cal.App.4th 37, 45.) Furthermore, even if Dr. Colvin had testified that vaginal moistness does not prove sexual contact and that a child can contract a urinary tract infection for reasons other than sexual contact, the weight of the other evidence was too strong for there to be prejudice. Jane Doe's specific testimony about three incidents on two occasions sufficed to make the prosecution's case.

E. Judicial Misconduct

Defendant contends the court was hostile, intimidating, and biased against his case. We have reviewed the record. The court displayed (understandable) impatience with defense counsel's lack of preparation and some of his strategies. But there was no judicial misconduct.

As discussed in *People v. Carpenter* (1997) 15 Cal.4th 312, 353, "A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution. [Citations.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238, 1240-1242; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Sanders* (1995) 11 Cal.4th 475, 531-532; *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1567; *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174-1175; *People v. Hefner* (1981) 127 Cal.App.3d 88, 95-96; *People v. Black* (1957) 150 Cal.App.2d 494, 504) We have read each of the alleged instances of misconduct in context. They fall far short of establishing misconduct or "betray[ing] a bias against defense counsel." (*People v. Wright* (1990) 52 Cal.3d 367, 411.)

Almost every instance cited by defendant can be reasonably refuted. After the trial court was initially skeptical of using a sleep expert, it finally allowed the evidence. Similarly, the trial court criticized a videotaped enactment illustrating defendant's version of events but allowed defendant to show it to the jury during closing argument.[4] Outside the jury's presence, the trial court properly recommended defense counsel tailor his questioning to accommodate Carla's limitations as a witness. The court also cautioned defense counsel about not disrupting Jane Doe's testimony with improper objections. The refusal to admit a graphic novel about vampires was not an instance of misconduct

[4] We also reject as harmless error any abuse of discretion in not admitting the videotaped enactment as evidence.

when Jane Doe testified she did not see the movie "Interview with a Vampire" until much later than the time of the subject events. The court's several expressions of impatience with defense counsel's examination style, again occurring outside the presence of the jury, seem warranted when read in context.

As to the court's dozen or so comments made before the jury, they illustrate the court trying to clarify the testimony being offered or explain its relevance. At times, the court assisted defense counsel. In a six-day trial, prolonged by defense counsel's failure to provide discovery, the court's occasional expressions of mild frustration do not constitute judicial misconduct. Nothing crossed the line into improper behavior or was prejudicial to the defense cause. The trial court had the duty to control the trial. (§ 1044; *People v. Fudge, supra*, 7 Cal.4th at p. 1108.) It effectively fulfilled that duty.

F. Sufficiency of Evidence

In his arguments about prosecutorial misconduct and expert evidence, defendant challenges the sufficiency of the evidence for his convictions. He also performs a detailed analysis of the sufficiency of the evidence to support count 1 based on the March 2001 episode. With respect to that incident, Jane Doe recounted in the RCAT interview when she was seven years old, that defendant had used his hand to rub her "front bottom" and "back bottom," causing her "front bottom" to feel "kind of wet." That videotaped interview was played to the jury. At trial, she testified that one night when she was about six years old, defendant came into her bedroom at night and touched her "private part" under her pajamas. As to counts 2 and 3, she testified there occurred two separate instances of touching, just as she had in the RCAT interview.

Contrary to defendant's characterization, Jane Doe's interview statements and testimony meet the *Jones* test for satisfactory generic testimony in a molestation case: ". . . even generic testimony . . . outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.. . . [¶] The question arises, then, as to the minimum quantum of proof necessary to support a conviction on one or more counts based on such generic testimony. [¶] . . . [¶]

"The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe the general time period in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 314-316.)

Jane Doe consistently described the March 2001 incident as involving a single instance of touching by which she apparently meant some kind of manual masturbation.

It happened when she was six or seven, some time before the second episode in December. About December, she also described two instances of touching in both the RCAT interview and the trial testimony. Sufficient evidence supported defendant's convictions on all counts. We cannot disagree with the jury's conclusions.

G. Denial of Probation

Defendant protests the court's denial of probation based primarily on defendant's continuing claim of innocence and lack of remorse. (Cal. Rules of Court, rule 4.414(b)(3).)

We review the trial court's denial of probation for abuse of discretion, meaning "arbitrary determination, capricious disposition or whimsical thinking." (*People v. Rist* (1976) 16 Cal.3d 211, 219; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364-365.)

In the present case, defendant was evaluated pursuant to section 288.1 by two psychologists.[5] Both reports were somewhat equivocal about recommending probation although, on balance, they did not favor prison. The probation report recommended prison because of defendant's lack of remorse. (Cal. Rules of Court, rule 4.414(b)(7).

The court considered the following factors in denying probation: defendant occupied a position of special trust in the victim's household; the victim was vulnerable; substantial sexual conduct occurred; rehabilitation was not feasible because of defendant's claims of innocence; and defendant had no criminal history. (Cal. Rules of

[5] The court ordered stricken a third psychological report and references to the report made in the probation officer's report. We find no error in the court refusing to strike the probation report in its entirety.

Court, rule 4.414 (a)(1),(3), and (9), and (b)(1), (3), and (7).) The record simply does not reflect that, in denying probation, the court acted arbitrarily, capriciously, or whimsically. No abuse of discretion occurred.

H. Section 654

Defendant's final argument is the court erred by imposing sentences two and three concurrently with count 1 instead of staying count 3 under section 654. This argument fails because the evidence clearly supported a jury finding that defendant molested Jane Doe at least twice on the same occasion in December, coming into her bedroom once and returning again for a second time. The temporal separation afforded defendant the opportunity to reflect upon and renew his intent between the two offenses. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) As announced by the Supreme Court, "section 654 does *not* bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim . . . ." (*People v. Harrison* (1989) 48 Cal.3d 321, 325, citing *People v. Perez* (1979) 23 Cal.3d 545, 552-553.)

III

DISPOSITION

In light of the foregoing, we reject defendant's claim of cumulative error and affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Richli
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.